



King's Research Portal

DOI:

[10.1111/lest.12167](https://doi.org/10.1111/lest.12167)

Document Version

Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Yip, M., & Lee, J. (2017). The commercialisation of equity. *Legal Studies*, 37(4), 647-671.
<https://doi.org/10.1111/lest.12167>

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

This article was accepted for publication in *Legal Studies* on 14th
February 2017.

The Commercialisation of Equity

Man Yip* and James Lee[†]

Abstract: *This article analyses the jurisprudence on the relevance of the commercial context to principles of the law of equity and trusts. We criticise recent UK Supreme Court decisions in the area (chiefly Williams v Central Bank of Nigeria, FHR European Ventures v Cedar Capital Partners and AIB Group v Mark Redler & Co) and identify a trend of the ‘commercialisation’ of the issues. The cases are placed in comparative context and it is argued that there is an unsatisfactory pattern of judicial reasoning, exhibiting a preference for some degree of unarticulated flexibility in commercial adjudication. But the price of that flexibility is a lack of doctrinal coherence and development of equitable principles which will apply in, and beyond, the commercial context. We also argue that this trend has important implications for the coming rounds of Supreme Court appointments.*

1. Introduction

‘The question when it is right to invoke an equitable right in a commercial context is not always easy to resolve.’¹

In 1516, St Thomas More’s *Utopia* was published, with Holdsworth noting that at the time of its writing:

New countries, new nations, new phenomena of all kinds were emerging. With these things the old learning, the old modes of thought and reasoning were powerless to deal. These things must be investigated; and the results of that investigation necessarily led to the abandonment of old theories.²

* Associate Professor, Singapore Management University and D.S. Lee Foundation Fellow.

[†] Senior Lecturer in Private Law, The Dickson Poon School of Law, King’s College London, and Associate Academic Fellow of the Inner Temple. A previous version of this article was presented at the Eighth Biennial Conference on the Law of Obligations at the University of Cambridge in July 2016. We are grateful to those who attended, including Elise Bant, Michael Bryan, Robert Chambers, Tatiana Cutts, Jamie Glister, Lusina Ho, Rebecca Lee, Charles Mitchell, Andrew Robertson, Graham Virgo and Sarah Worthington for helpful comments. All views, and any errors are our own: manyip@smu.edu.sg and james.lee@kcl.ac.uk.

¹ *Thanakharn Kasikorn Thai Chamkat v Akai Holdings* [2010] HKCU 2362, [145] (Lord Neuberger NPJ).

² W Holdsworth, *Some Makers of English Law* (CUP, Cambridge, 1938) 72.

More would go on to become the first common lawyer to reach the office of Lord Chancellor.³ Scott remarked that equity ‘did not begin to assume the shape of law until More became Chancellor,’ and that it took ‘a great stride forward during his administration.’⁴

500 years after *Utopia*, Lord Neuberger has noted that ‘equity is alive in the UK Supreme Court’.⁵ Here we consider the extent to which ‘old modes of thought’ in equity are being challenged by perceived commercial phenomena. The perspectives of current Justices of the Court – especially those who were not Chancery lawyers – are informing a reinterpretation of equitable principles and in some instances, their application in different contexts. In 2014, the Supreme Court handed down three landmark judgments— *Williams v Central Bank of Nigeria*,⁶ *FHR European Ventures v Cedar Capital Partners*⁷ and *AIB Group v Mark Redler & Co*⁸—that resolved some of the most difficult debates in equity. All three disputes arose in the commercial context. In *AIB*, the Supreme Court restated the law of equitable compensation for breach of trust as being concerned only with making good losses suffered but for the breach, thereby aligning equitable compensation with damages at law. In *FHR*, the Supreme Court opted for the ‘simple’ answer, based mainly on policy considerations, that all unauthorised profits received by fiduciaries are held on constructive trust for the principal. In *Williams*, the Supreme Court sharply distinguished between strangers to a trust and trustees for limitations purposes, with little regard for the arguable doctrinal similarities between knowing recipients and express trustees and even less regard for sensible statutory interpretation.

The judicial reasoning in each case, as this article will show, is underlined by commercial pragmatism of simplifying legal standards for commercial actors, as well as wider commercial concerns. Lord Neuberger commented in *Patel v Mirza* that ‘the ultimate function of the courts in common law and equity is to formulate and develop rules of a clear and practical nature’.⁹ However, the ‘commercialisation’ of equity at the highest level—whether by way of context-based application or commercially-driven reinterpretation¹⁰ of

³ Lawton J in *Rondel v Worsley* [1967] 1 Q.B. 443 at 459. Professor Holdsworth recorded that Cardinal Wolsey was the last of the ecclesiastical Chancellors of the modern type. He was replaced in 1529 by Sir Thomas More—an eminent common lawyer and the son of a common law judge’: W Holdsworth, ‘The Influence of Roman Law on English Equity’ in WS Holdsworth, *Essays in Law and History* (OUP, Oxford, 1946) 193-4.

⁴ AW Scott, *Trusts* §1.1. See also G Glen, ‘St Thomas More As Judge and Lawyer’ (1941) 10 *Fordham Law Review* 187, 193: ‘in the great idea of equity to which he turned his energies, St. Thomas More was quite modern, just as he was in all other things’. On the other hand, Hanbury does not mention More at all in his ‘Historical Sketch of Equity’ offered as chapter one of the first edition of *Modern Equity* (Stevens & Sons, London, 1935).

⁵ Lord Neuberger, ‘Equity – The soul and spirit of all law or a roguish thing?’ Lebane Lecture 2014, Supreme Court of New South Wales, Sydney, 4 August 2014.

⁶ [2014] A.C. 1189.

⁷ [2014] UKSC 45.

⁸ [2014] UKSC 58.

⁹ [2016] 3 WLR 399 at [170].

¹⁰ There is an imperfect parallel with the contractual interpretation cases. See *Arnold v Britton* [2015] UKSC 36 at [17] where Lord Neuberger PSC cautioned that ‘the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of

what are the fundamental principles—often takes place discreetly under the cloak of context-neutrality. Such a tacit yet paradigmatic shift risks undervaluing the importance of equitable doctrine and bypassing the need for transparent reasoning.¹¹

Further, as with More's influence on the Chancery as an institution, we argue that an appreciation of the views of particular Justices in the Supreme Court as to equity is crucial to an understanding of the development of the law, and the normative choices involved. This article therefore offers a critical analysis of contemporary developments of equity not only by reference to principle, but also by considering the influence of the particular judges and the methods employed. Presently, the place of equity in commerce is not at risk; if anything, it is the core of the equitable principles that are in jeopardy.

2. Judges, Commerce and Equity

Holdsworth had high praise for More, whose 'beautiful character would have made him an ideal Chancellor at any time'.¹² Similarly, Holdsworth viewed the appointment of More as 'an important turning-point in the history of equity',¹³ because More rationalised and brought coherence to the operation of the relevant principles, and restored 'harmonious relations between the court of Chancery and the common law courts for the next half a century'.¹⁴ More's Chancellorship was thus transformative.

The assessment of Supreme Court decisions below highlights the influence of certain Justices on the recent developments. Notable contributors appear to be Lord Neuberger PSC (a Chancery judge), Lord Sumption JSC and Lord Mance JSC (commercial lawyers by background). There is no requirement that the Supreme Court should have a particular complement of Chancery lawyers, with the only statutory requirement that 'between them the judges will have knowledge of, and experience of practice in, the law of each part of the

the provision which is to be construed'; ZX Tan, 'Beyond the real and the paper deal: the quest for contextual coherence in contractual interpretation' (2016) 79 MLR 623 and D McLauchlan 'A better way of making sense of contracts?' (2016) 132 LQR 577. See further Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2; [2015] A.C. 129 at [20], applying the same principles to a will. The emphasis on commercial context in considering the certainty of intention to create a trust was recently considered by the High Court of Australia in *Korda v Australian Executor Trustees (SA) Limited* [2015] HCA 6 (especially per Keane J at [230]–[237]). See also a case on interpretation of trust deeds in a commercial context (albeit one which Lord Sumption in dissent at [55] described as being 'of considerable financial importance to the parties but rais[ing] no questions of wider legal significance'): *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 Plc* [2016] UKSC 29.

¹¹ See further Sir Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238 and Lord Millett, 'Equity's place in the law of commerce' (1998) 114 LQR 214.

¹² W Holdsworth, *Some Makers of English Law* (CUP, Cambridge, 1938) 98-9.

¹³ W Holdsworth, *Some Makers of English Law*, 98.

¹⁴ W Holdsworth, *Some Makers of English Law*, 99.

United Kingdom’.¹⁵ The last round of appointments was in 2013, when Lords Hughes, Toulson and Hodge JJSC were appointed. Lord Toulson replaced the retiring Lord Walker,¹⁶ which has since left the Court ‘looking a bit threadbare on the chancery side’.¹⁷ Lord Neuberger is the only Chancery specialist currently serving on the Court, albeit that Lord Carnwath served in the Chancery Division when in the High Court, but as his Lordship has conceded, his practice at the Bar had principally been in planning and local government law.¹⁸ In addition, Lord Collins has occasionally returned as an ad hoc judge since his retirement to assist in such cases.¹⁹ As we shall see below in Section 4, even Lord Neuberger has changed his mind on key issues, As his Lordship has said (speaking of himself in the third person, as he did in *FHR*): ‘Lord Neuberger is not on his own when it comes to judicial tergiversations on the issue of a principal’s proprietary interests in his agent’s bribe. His volte-face is by no means an exception in what is seen by some as the placid waters of equity’.²⁰

We argue that this lack of specialist Chancery expertise has seen the Supreme Court’s equity jurisprudence take a more commercial turn. The days are past when commercial lawyers might fear their cases in the highest cases being decided by a ‘Chancery lawyer often regarded as somewhat unbending’.²¹

To an extent, these arguments relate to questions of fusion, and *AIB*, for example, is replete with references to the fusion debate.²² Australian judges have long debated the development of equitable principles, particularly with the influence on legal thinking of late adoption of the Judicature Act²³ fusion in New South Wales.²⁴ This is not the place to reopen

¹⁵ Constitutional Reform Act, s 27(8).

¹⁶ Lord Walker’s last judgment was in the Equity case of *Pitt v Holt* (known as *Futter v HMRC*; *Pitt v HMRC*) [2013] UKSC 26.

¹⁷ J Rozenberg, ‘Judicial appointments: new boys at the Supreme Court’ *The Guardian*, 27 February 2013.

¹⁸ ‘I had no practical experience of many subjects which were the everyday work of the [Chancery] division – such as company, trusts, insolvency, intellectual property and so on. It was also a very lively time for the development of the law in many of those areas. To me they were relatively uncharted territory. It was steep learning curve’: Lord Carnwath, ‘People and principle in the developing law’, address at the Eighth Biennial Conference on the Law of Obligations: ‘Revolutions in Private Law’, Cambridge, 19 July 2016 <https://www.supremecourt.uk/docs/speech-160719.pdf>.

¹⁹ Lord Collins sat in *Scott v Southern Pacific Mortgages Ltd & Ors* [2014] UKSC 52 (giving the lead judgment); *FHR* [2014] UKSC 45; *Rubin & Anor v Eurofinance SA* [2012] UKSC 46 (giving the lead judgment); and *Re Lehman Brothers International (Europe)* [2012] UKSC 6.

²⁰ Lord Neuberger, ‘Equity – The soul and spirit of all law or a roguish thing?’, Leane Lecture 2014, Supreme Court of New South Wales, Sydney, para 10.

²¹ F Reynolds, ‘Commercial Law’ in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford, 2009), 704 (speaking of Lord Simonds).

²² See eg, Lord Toulson’s opening at [1] ‘140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams’: *AIB* [2014] UKSC 58. Lord Mansfield also was a much-criticised proponent of fusion: W Holdsworth, *Some Makers of English Law*, 173.

²³ S 64, Supreme Court Act 1970 (NSW); Law Reform (Law and Equity) Act 1972.

²⁴ See PW Young, ‘Equity, Contract and Consistency’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, Thomson, Sydney 2005), 489.

those wounds, beyond noting that the debate has been particularly vigorous in the commercial context.²⁵ But we may note that the issues examined below are thrown into relief, and into the courts, by the increased willingness in recent years of lawyers for commercial actors to invoke the utility of equitable concepts as ways of avoiding statutory or common law rules relating to insolvency, limitation, and causation. Below, we consider the judicial responses to these attempted innovations – sometimes the court removes established distinctions between damages at law and compensation in equity,²⁶ or avoids fine distinctions (as in *FHR*).²⁷ The point was well made by Sir Anthony Mason:

The rise of the modern commercial economy... has raised in an acute form important issues concerning the extension and application of equitable doctrines and principles. That is because trusts are created in commercial settings and commercial transactions are so structured that they provide scope for the creation of relationships recognised in equity, with consequences for proprietary remedies and for third parties.²⁸

The inventiveness of equity has been exploited by lawyers seeking advantage in commercial litigation, and that poses challenges.

The development of English commercial law owes, of course, a great debt to another great judge Lord Mansfield, and in his best endeavours in this field, drew on both common law and equity. As Hanbury observed:

In the field of commercial law, equity missed its chances of capturing a large jurisdiction owing to the scheme of incorporating that topic into the common law which, it is not too much to say, formed the chief life-work of Lord Mansfield. That great judge, however, had a mind strongly imbued with equitable doctrine, and was reported to have said on one occasion that he never liked common law so well as when it resembled equity. The commercial law, therefore, which he converted into common law, tends to be somewhat coloured by equity, and in certain important branches of it equity has gained a very strong foothold.²⁹

Our critique here is not framed in terms of common law versus equity, except insofar as the common law position is preferred as part of the court's commercialist common sense approach.³⁰ It is our contention that in the current period, albeit not necessarily in as

²⁵ See, for eg, JD Heydon, 'The Hon Roderick Pitt Meagher AO QC (1932–2011)' NSW Bar News, Winter 2011; M Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444; W Gummow, 'Equity: Too Successful' (2003) 77 *Australian Law Journal* 30; K Mason 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, Thomson, Sydney 2005) and W Gummow, 'Conclusion' in *Equity in Commercial Law*.

²⁶ See section 3 below.

²⁷ See section 4 below.

²⁸ A Mason, 'Equity's role in the twentieth century' (1997–98) 8 K.C.L.J. 1 at 4.

²⁹ HG Hanbury, 'The Field of Modern Equity' (1929) 45 L.Q.R. 196 at 200. See further W Holdsworth, *Some Makers of English Law*, 160-175.

³⁰ Hon Peter Young, the former Chief Judge in Equity in New South Wales, has contrasted 'fusion' with 'fission' in this context, in the sense of the development of principles by either adoption or innovation: 'Equity,

deliberate manner as More's, nor (so far) as concerted as the efforts of Lord Mansfield,³¹ commercial law is colouring the law of equity.

Our study also has significant implications for the balance of expertise on the Supreme Court. Six vacancies will arise on the Court before the end of 2018,³² and several of those retiring Justices are those who have played key roles in the cases considered here (Lords Neuberger, Mance, Toulson and Sumption). The Court has announced that it will hold the two joint selection exercises to appoint three Justices in each round. This approach followed a review of the appointments process by Jenny Rowe, the former Chief Executive of the Court,³³ and seeks to encourage applicants from a diverse range of backgrounds and specialisms.³⁴ The trend of the recent Supreme Court decisions on equity re-emphasises the need for Chancery expertise amongst the Justices.

3. Compensatory Liability for Breach of Trust

(a) One Law of Trusts or Two?

In *Target Holdings Ltd v Redferns*, Lord Browne-Wilkinson famously said that in order not to render a trust 'commercially useless',³⁵ the courts must distinguish between 'basic principles of trust and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind'.³⁶ Where equitable compensation for breach of trust is concerned, Lord

Contract and Conscience' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, Thomson, Sydney 2005) 510-512.

³¹ Lord Mansfield admired More's valiant attempts to persuade common law judges to grant relief: *Wyllie v Wilkes* (1780) 2 Douglas 519, 523. Lord Mansfield may also have been the source for the line (via Harman J) that 'Equity ought not to be presumed to be past the age of child-bearing': Sir Raymond Evershed, 'Equity ought not to be presumed to be past the age of child-bearing' (1953) 1 *Sydney Law Review* 1, fn1.

³² 'Statement on Supreme Court appointments process' <https://www.supremecourt.uk/news/statement-on-supreme-court-appointments-process.html> (accessed at 28 September 2016). Lord Toulson retired on 22 September 2016 (but will continue to sit on an ad hoc basis): the other five Justices will all retire in 2018: Lord Neuberger, Lord Clarke, Lord Mance, Lord Hughes and Lord Sumption. See further Lord Neuberger, 'The Role of the Supreme Court Seven Years On – Lessons Learnt', Bar Council Law Reform Lecture 2016, 21 November 2016 <https://www.supremecourt.uk/docs/speech-161121.pdf>, para 52.

³³ 'Chief Executive's review of the process followed by Selection Commissions making recommendations for appointment to The Supreme Court' (July 2015) <https://www.supremecourt.uk/docs/review-of-selection-commission-process-july-2015.pdf> (accessed at 28 September 2016). Neuberger (n 32) paras 52-8.

³⁴ Concern about the need for Chancery specialism was noted by one of the Chief Executive's consultees: *ibid*, 4. For his part, Lord Sumption has professed scepticism as to the value of specialisms: 'I have always taken the view that legal specialisations are essentially bogus. At the bar, I liked to trespass on other people's cabbage patches. As a judge I do it most of the time.' Lord Sumption, 'Family law at a distance', At a Glance Conference 2016, Royal College of Surgeons, 8 June 2016, (<https://www.supremecourt.uk/docs/speech-160608.pdf>) 1.

³⁵ *Target Holdings Ltd v Redferns* [1996] AC 421 at 435.

³⁶ *Target Holdings Ltd v Redferns* [1996] AC 421 at 435.

Browne-Wilkinson said that the basic rule is that the beneficiary is entitled to compensation for losses that are suffered but for the breach.³⁷ Relevantly, the specialist rule of reconstitution of the trust fund does not apply in the context of a commercial bare trust once the underlying transaction has been completed.³⁸ In his view, the rationale of reconstitution—‘no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the trust’³⁹—is irrelevant for cases like *Target Holdings*.

The proposed binary classification of basic and specialist principles has the potential to change the content of trust law fundamentally. Traditionally, equity caters for a range of different breaches, distinguishing between cases of misapplication of trust assets and cases involving lack of prudence and diligence on the part of the trustee. In equitable parlance, the liability flows from the trustee’s primary duty to account for his stewardship.⁴⁰ Where there is a misapplication of trust assets, the beneficiary can choose to falsify the account:⁴¹ the unauthorised disbursement would be disallowed, giving rise to a shortfall in the trust estate that the trustee becomes liable to make good, either *in specie* or by paying the monetary equivalent. The objective of the falsified account is to provide the substitutive performance of the obligation, that is to say, to treat the misapplied assets as being still in the trust fund.⁴² Causation between loss and breach is therefore irrelevant. On the other hand, where the trustee has, through the lack of diligence or prudence, caused loss to the trust fund, the beneficiary can surcharge the account. As the surcharging of account has a reparative aim, causation between breach and loss is relevant to the monetary liability derived therefrom.

Target Holdings concerned a misapplication of trust funds by the conveyancing solicitors who held the monies on trust for the lender pending completion of the mortgage transaction. Contrary to the lender’s instructions, the solicitors paid away the funds to the borrower without obtaining the required security, although the security was executed a month later. Lord Browne-Wilkinson held that the transaction was ‘completed’, and the lender-beneficiary was therefore not entitled to reconstitution of the trust fund. However, in *Youyang v Minter Ellison Morris Fletcher*, the High Court of Australia explicitly disagreed with such a context-based application of remedial principles.⁴³

Whilst much criticism has been directed at the commercial and non-commercial divide,⁴⁴ less attention has been paid to the corollary ‘basic’ and ‘specialist’ distinction in

³⁷ *Target Holdings Ltd v Redfems* [1996] AC 421 at 436.

³⁸ *Target Holdings Ltd v Redfems* [1996] AC 421 at 436.

³⁹ *Target Holdings v Redfems* [1996] AC 421 at 434-436.

⁴⁰ *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1513].

⁴¹ If the unauthorised disbursement turns out to be profitable, the beneficiary may choose to adopt it. See Lord Millett, ‘Equity’s place in the law of commerce’ (1998) 114 LQR 214 at 226.

⁴² For this reason, the trustee is liable to account for the entire misapplied sum, regardless of whether the trust estate would have sustained the same measure of loss even if the duty was duly performed.

⁴³ *Youyang* [2003] HCA 15 at [49].

⁴⁴ See, for eg, J Edelman, ‘Money awards of the cost of performance’ (2010) 4 J Eq 122 at [].

remedial principles. As explained above, the falsification and surcharging of accounts are simply principles developed for different kinds of breaches that occur in both commercial and traditional trusts. Yet, by labelling one as the ‘basic’ trust principle, primacy is accorded to the compensatory aspect of trust law, whilst downplaying the custodianship feature of the trust relationship upon which the falsification of account is based. Importantly, viewed against the commercial and non-commercial divide, the basic and specialist principle distinction is indicative of covert judicial rewriting of what is the norm and what is the exception, by prioritising what is deemed fitting for the commercial setting. As we shall go on to argue, this influence of commercial thinking is apparent in other recent equity and trusts cases from the highest courts of the various common law jurisdictions.

The ‘rewriting’ of trust law is facilitated by the equitable accounting rules descending into neglect historically owing to changes in practice⁴⁵—most notably, the rise of the terminology of ‘equitable compensation’, which replaced the language of accounting. The differentiation between the awards derived from falsification and surcharging of accounts respectively became obscured as a result. *Target Holdings* exemplifies the increasingly common practice of the courts assessing equitable compensation without reference to the accounting rules. The controversial reasoning of *Target Holdings*—at least, to equity traditionalists—led to a proliferation of modern scholarship on the equitable account,⁴⁶ much of which is written with the hope of fully reviving them in practice to bring about clarity to the law of equitable compensation for breach of trust.⁴⁷ But these efforts failed to persuade. In the landmark case of *AIB*, the UK Supreme Court affirmed that the basic principle is this: equitable compensation serves a reparative function—it is available for losses suffered but for the breach of duty.⁴⁸

AIB arose from a commercial remortgage transaction. AIB advanced £3.3m to the solicitors to hold on trust pending completion. The solicitors were instructed to redeem the existing charge over the borrowers’ home in favour of Barclays Bank out of the advance, obtain a first charge over the property in favour of AIB and then release the remaining funds to the borrowers. In breach of trust, the solicitors failed to transfer sufficient money to Barclays Bank to fully redeem the existing charge—the shortfall being approximately

⁴⁵ Justice Edelman (extra-judicially), ‘An English misturning with equitable compensation’ (UNSW Australia colloquium on equitable compensation and disgorgement of profit, 7-8 August 2015), available at: <http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508> (accessed at 7 June 2016).

⁴⁶ See, for example, Lord Millett, ‘Equity’s place in the law of commerce’ (1998) 114 LQR 214; S Elliott, ‘Remoteness Criteria in Equity’ (2002) 65 MLR 588; S Elliott and C Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67 MLR 16; J Edelman, ‘Money awards of the cost of performance’ (2010) 4 J Eq 122; J Glister, ‘Equitable Compensation’ in (eds), *Fault Lines in Equity*, J Glister and P Ridge (Eds), Hart Publishing, Oxford, 2012, at p 143; C Mitchell ‘Equitable Compensation for breach of fiduciary duty’ (2013) 66 CLP 307.

⁴⁷ Cf C Rickett, ‘Where are We Going with equitable Compensation’ in *Trends in Contemporary Trust Law*, A Oakley (Ed), OUP, Oxford, 1996, p 29; A Burrows, ‘We Do This at Common Law and That in Equity’ (2002) 22 OJLS 1 at 10-11.

⁴⁸ *AIB* [2014] 3 WLR 1367 at [73] (Lord Toulson) and [136] (Lord Reed). See also PG Turner, ‘The new fundamental norm of recovery for losses to express trusts’ (2015) 74 CLJ 188.

£309,000. This resulted in excessive funding being released to the borrowers. AIB managed to obtain a second charge over the property in pursuance to negotiations with Barclays Bank. The borrowers subsequently defaulted. Owing to the prevailing depressed market conditions, the property was sold for only £1.2m. After paying off £309,000 that was due to Barclays Bank, AIB only obtained £867,697. It then sued the solicitors for approximately £2.5m, being the difference between the loan and the amount it recovered from the sale.

The Supreme Court unanimously found in favour of the solicitors, ruling that AIB was only entitled to £275,000, being the loss it suffered by comparison with what it would have received had there been no breach. Affirming *Target Holdings*, both Lord Reed and Lord Toulson were of the view that English law had clearly moved on from the days of equitable account.⁴⁹ Equitable compensation was to be derived from moving from the breach of duty directly to the remedy, without reference to the accounting principles.⁵⁰ In Lord Toulson's view, the falsification of account is simply a legal 'fairy tale'.⁵¹

Relevantly, both Lord Toulson and Lord Reed, writing separately,⁵² rejected a context-based approach towards the application of remedial principles for breach of trust. They clarified that the presence of an underlying contract in the commercial context is merely a fact to be considered in determining the losses caused by the breach of trust.⁵³ Indeed, Lord Reed interpreted Lord Browne-Wilkinson's context-based analysis in *Target Holdings* to result in a difference in the procedure of payment (to whom the payment is made), as opposed to the quantum of payment.⁵⁴

But Lord Toulson's judgment, on close scrutiny, does not fully support a context-neutral approach. Lord Toulson said that 'the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law' in cases such as *Target Holdings*.⁵⁵ Moreover, he went on to endorse the application of Lord Browne-Wilkinson's reasoning in *Target Holdings* to the *AIB* dispute, on the basis that the transaction in *AIB* was similarly 'completed'.⁵⁶ But it should not be missed that unlike *Target Holdings*, where the required security was obtained belatedly post-breach, the same was not achieved in *AIB*. In so doing, Lord Toulson unwittingly entrenched a context-based approach (of a different kind) towards remedial principles for breach of trust by extending Lord Browne-Wilkinson's analysis. The point is this: the unavailability of the reconstitution of trust in

⁴⁹ *AIB* [2014] 3 WLR 1367 at [69] (Lord Toulson) and [138] (Lord Reed).

⁵⁰ J Glister, 'Breach of trust and consequential loss' (2014) 8 J Eq 235 at 238 and 258.

⁵¹ *AIB* [2014] 3 WLR 1367 at [69].

⁵² With both of whom Lord Neuberger, Baroness Hale and Lord Wilson agreed.

⁵³ *AIB* [2014] 3 WLR 1367 at [71] (Lord Toulson) and [137] (Lord Reed).

⁵⁴ *AIB* [2014] 3 WLR 1367 at [108].

⁵⁵ *AIB* [2014] 3 WLR 1367 at [71].

⁵⁶ *AIB* [2014] 3 WLR 1367 at [74]. This part of Lord Toulson's reasoning contradicts his earlier insistence that the same general principles would apply in respect of both commercial and traditional trusts.

Target Holdings did not affect the outcome of the case because the trust estate eventually received the sought for asset, thereby justifying the premature disbursement of funds. An analysis by way of falsification of outcome would have produced the same result.⁵⁷ Lord Toulson's pragmatic understanding of 'completion' of transaction, on the other hand, would have produced different outcomes.

The combined effect of *Target Holdings* and *AIB* (which unreservedly affirmed the former) is therefore difficult to grasp and articulate, as Foskett J conceded in *Various Claimants v Giambrone & Law (A Firm)*.⁵⁸ In *Purrunsing v A'Court & Co (a firm)*, Judge Pelling QC, citing Lord Toulson's judgment, interpreted *AIB* as being 'concerned with the measure of equitable compensation for breach of trust that applies where there has been a breach of a bare trust arising in the context of a commercial contract to which the trustee and beneficiary are parties'.⁵⁹ He thus commented that equitable compensation should be the same as if contractual damages are sought only in cases where there is an underlying contract.⁶⁰ On such an interpretation, equitable compensation would be assessed differently where there is no underlying contract, thereby giving rise to two sets of compensatory principles for breach of trust.⁶¹

The unacknowledged (or unappreciated) development of two sets of equitable principles is potentially dangerous, though not unprecedented.⁶² It is dangerous because the adaptation of equitable principles in response to the commercial context has occurred without proper justification and is discreetly being passed off as part of the general principles. Whilst the common law (in its broad sense of judge-made law, including equity) envisages the incremental development of its principles over the course of time, such progressive changes are to take place by way of transparent and sound reasoning.

(b) Equitable Compensation and the Trustee's Obligation

⁵⁷ See Lord Millett, 'Equity's place in the law of commerce' (1998) 114 LQR 214 at 227 and (as Lord Millett NPJ) in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 369.

⁵⁸ [2015] EWHC 1946 (QB) (see Appendix 3 (Supplemental Judgment) at [7]).

⁵⁹ [2016] EWHC 789 (Ch) at [42]. The case concerned breach of trust by the vendor's solicitors and the purchaser's solicitors in paying purchase money away to the vendor who fraudulently claimed to be the true registered proprietor of the property. The case did not concern the assessment of equitable compensation for breach of trust specifically. A main issue before the court was discretionary relief from liability under section 61 of the Trustees Act 1925. Counsel for the vendor's solicitor relied on *AIB*—specifically, Lord Toulson's point that the solicitor-trustee's liability in equity ought not exceed his liability at law—in his argument that a more favourable standard of 'reasonableness' should be applied to his client.

⁶⁰ *Purrunsing* [2016] EWHC 789 (Ch) at [42].

⁶¹ This raises the issue of incidental rules for concurrent liability, though Lord Toulson did not explicitly address liability for equitable compensation in that particular context.

⁶² Another example is the re-interpretation of the content of 'irreducible core' of a trustee's obligations in *Citibank NA v MBIA Assurance SA* [2007] 1 All ER (Comm) 475, a dispute arising in the debt securitisation context. See A Trukhtanov, 'The irreducible core of trust obligations' (2007) 123 LQR 342; M Yip, 'The Commercial Context in Trust Law' [2016] Conv (forthcoming).

Taking a chronological overview of the evolution of remedial principles for breach of trust, we see the initial equal and co-existence of falsification and surcharging of accounts in the days of equitable account, which later evolved to the bifurcation between the basic principle (compensation) and the specialist principle (reconstitution) in *Target Holdings* and finally arriving at just compensation for breach of trust in *AIB*. It may be said the commercial context—from which the disputes in both *Target Holdings* and *AIB* arose—is a key driver of the emergence of the equitable compensatory principle for breach of trust. The contract, from which the commercial trust arose in *Target Holdings* and *AIB*, fortified the analogical bridge between equitable compensation for breach of trust and damages for breach of contract.⁶³ The court's attention was intensely focused on the bigger picture of performance of the transaction, as opposed to the specific snapshot of custodianship provided by the trust institution in the transactional process. In *AIB*, Lord Reed reflected thus:

As the case law on equitable compensation develops, however, the reasoning supporting the assessment of compensation can be seen more clearly to reflect an analysis of the characteristics of the particular obligation breached. This increase in transparency permits greater scope for developing rules which are coherent with those adopted in the common law.⁶⁴

The golden victory of the equitable compensatory principle, however, has profound implications for the contemporary content of a trustee's obligations. That a bare trust is employed as part of the machinery of the trust does not alter the bare trustee's obligation, like the obligations of trustees in traditional trusts, to 'get the trust property in, protect it, and vindicate the rights attaching to it'.⁶⁵ The traditional falsification of account arises from the acknowledgement of the trustee's custodianship: conceptually, a falsified account creates an immediate 'debt' between the trustee and the beneficiary in the value of the misapplied assets.⁶⁶ This explains the reference to an 'equitable debt' in older English cases. In *AIB*, Lord Toulson, seemingly with little appreciation of the underlying conceptual significance, hastily concluded that the terminology had been replaced by the vocabulary of 'equitable compensation'.⁶⁷ The English abolition of the accounting rules—in particular, the falsification of account—is silently reforming the core obligation of trusteeship. More generally, as we argue here, it is symptomatic of a primacy of commercialist pragmatism in the Supreme Court's reasoning. Quite clearly, the Supreme Court's objective in *AIB* was to

⁶³ The compensatory principle in contract law has been recently affirmed on numerous occasions: *Golden Strait Corporation v Nippon Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 535; *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* EWHC 3153 (Comm); *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082; *Commodities Suisse SA v MT Maritime Management BV (The MTM Hong Kong)* [2015] EWHC 2505 (Comm).

⁶⁴ *AIB* [2014] 3 WLR 1367 at [138].

⁶⁵ *Fischer v Nemeske Pty Ltd* [2016] HCA 11 at [111] (Gaegler J).

⁶⁶ Justice Edelman, 'An English misturning with equitable compensation' (n 45 above). See also RS French CJ, 'Equitable Compensation', Hong Kong, 23 September 2015 and *McIntosh v Fisk* [2015] NZCA 74 at [20] (French and Harrison JJ).

⁶⁷ *AIB* [2014] 3 WLR 1367 at [61].

simplify the remedial rules for breach of trust. Specifically, on Lord Toulson's approach, equitable liability is aligned with contractual liability where there is an underlying contract, thereby allowing commercial parties to measure their liability based on a single standard.

We now move on to examine the Supreme Court's reasoning in *FHR*, a landmark judgment not only for the issue it resolved but also for how it was resolved, most remarkably, by way of Lord Neuberger's unexplained desertion of his own previous opinion.

4. Breach of Fiduciary Duty: Proprietary Relief for Unauthorised Benefits

(a) Constructive trust over unauthorised gains: commercial considerations

In *FHR*, the Supreme Court finally resolved the seemingly endless debate in English law concerning whether an agent held a bribe or secret commission received in breach of his fiduciary duty on trust for his principal. The answer given by the Supreme Court, in a unanimous judgment delivered by Lord Neuberger, was a resounding 'yes'. The state of English law before *FHR* was complex and unwieldy, with 200 years of inconsistent judgments and voluminous academic writing on the subject.⁶⁸ Yet, the answer to this question has important practical implications for the principal, most notably, with regard to the nature of injunctive relief available, the ability to invoke equitable tracing rules and priority in the event of the fiduciary's insolvency.

As a matter of principle, there are broadly two camps to the debate. Those in favour of proprietary relief generally base their arguments on the scope of the agency/fiduciary obligation,⁶⁹ treating the principal as being entitled to the benefits, whether authorised or unauthorised, received by the agent in the course of the agency. Detractors, on the other hand, champion the hard-nosed principles of property law that proprietary interests cannot arise over benefits that are not derived from the principal's assets.⁷⁰ Lord Neuberger's previous view in *Sinclair Investments* belonged to the latter camp. In that case, he laid down a controversial 'two-category' test that required some form of proprietary connection between

⁶⁸ *FHR* [2014] 3 WLR 535 at [1]. When the same case was in the Court of Appeal, Pill LJ remarked that '[c]onsideration of the views of commentators and practitioners generally on the subject of constructive trusts in the law of England and Wales reveals passions of a force uncommon in the legal world': *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 at [61].

⁶⁹ *FHR* [2014] 3 WLR 535 at [33]. See, eg, Lord Millett, 'Bribes and Secret Commissions' [1993] RLR 7; Lord Millett, 'Bribes and Secret Commissions again' (2012) 71 CLJ 583. See also an analysis based on attribution, divorced from wrongdoing by Lionel Smith: L Smith, 'Constructive trusts and the no-profit rule' [2013] CLJ 260; L Smith, 'Deterrence, prophylaxis and punishment in fiduciary obligation' (2013) 7 J Eq 87.

⁷⁰ *FHR* [2014] 3 WLR 535 at [31]. See, eg, R Goode, 'Proprietary restitutionary claims' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart, 1998) ch 5; S Worthington, 'Fiduciary duties and proprietary remedies: addressing the failure of equitable formulae' (2013) 72 CLJ 720.

the unauthorised benefits and the principal's assets (or assets that should properly belong to the principal) to justify proprietary relief.⁷¹ Although *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in admin rec)*⁷² did not concern the taking of a bribe or secret commission, Lord Neuberger's approach clearly ruled out proprietary relief in such a scenario.⁷³

In a surprisingly short judgment handed down by Lord Neuberger, the Supreme Court in *FHR* found a path straight out of the thicket by prioritising simplicity and practicality. Decisions such as *Tyrrell v Bank of London*,⁷⁴ *Metropolitan Bank v Heiron*⁷⁵ and *Lister & Co v Stubbs*,⁷⁶ which held against the imposition of a constructive trust, were overruled.⁷⁷ Lord Neuberger therefore repented⁷⁸ from his decision in *Sinclair Investments* to follow the aforementioned authorities, instead of *Attorney General of Hong Kong v Reid*.⁷⁹ In *Sinclair Investments*, Lord Neuberger MR (as he then was, delivering the leading judgment) provided seven reasons—ranging from precedent, principle, policy and ill-considered reasoning—as to why *Reid* should not be followed and would not likely be followed by the Supreme Court.⁸⁰

Lord Neuberger PSC's (as he now is) tergiversation in *FHR*, merely three years after *Sinclair Investments*, is, to say the least, unexpected: indeed, his Lordship has himself described it as 'a damascene conversion'.⁸¹ Importantly, his judgment in *FHR* did not directly engage in principle,⁸² notwithstanding his claim that it was a decision arrived based on both principle and practicality.⁸³ In fact, his Lordship went as far to say that the debate was one

⁷¹ [2011] 3 WLR 1153 at [88]. Essentially, a constructive trust would only arise over an asset received by a fiduciary in breach of fiduciary duty where the asset is or has been the beneficial property of the beneficiary (category 1) or it was acquired by taking an advantage of an opportunity or a right that properly belonged the beneficiary (category 2). The decision received mixed reviews: see, for eg, D Hayton, 'Proprietary liability for secret profits' (2011) 127 LQR 487; R Goode, 'Proprietary liability for secret profits: a reply' (2011) 127 LQR 493; G Virgo, 'Profits obtained in breach of fiduciary duty: personal and proprietary claim?' (2011) 70 CLJ 502.

⁷² [2011] 3 WLR 1153 (*Sinclair Investments*).

⁷³ Lord Neuberger's reasoning in *Sinclair Investments* was later applied by Newey J in *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286, a case concerning secret commissions.

⁷⁴ (1859) 27 Beav 273. See a detailed analysis of the House of Lords' decision: P Watts, 'Tyrrell v Bank of London – an inside look at an inside job' (2013) 129 LQR 527.

⁷⁵ (1880) 45 Ex D 319.

⁷⁶ (1890) 45 Ch D 1 (*Lister & Stubbs*).

⁷⁷ *FHR* [2014] 3 WLR 535 at [47] and [50].

⁷⁸ *FHR* [2014] 3 WLR 535 at [50].

⁷⁹ [1994] 1 AC 324 at [73]-[84]. *Reid* has been affirmed and followed by the English High Court in *Daraydan Holdings Ltd v Solland International Ltd* [2005] 4 All ER 73; *Ultraframe (UK) Ltd v Fielding* [2006] FSR 17.

⁸⁰ *Sinclair Investments* [2011] 3 WLR 1153 at [76]-[84].

⁸¹ Lord Neuberger, 'The Remedial Constructive Trust – Fact or Fiction' at the Banking Services and Finance Law Association Conference, Queenstown, New Zealand (10 August 2014), available at: <https://www.supremecourt.uk/docs/speech-140810.pdf> (accessed at 28 September 2016) para 2.

⁸² See also D Whayman, 'Proprietary remedy confirmed for bribes and secret commissions' [2014] Conv 518, 521.

⁸³ *FHR* [2014] 3 WLR 535 at [32] and [46].

that had no ‘plainly right or plainly wrong answer’ and that there ‘can clearly be different views’ as to the proper requirements for the creation of a proprietary interest.⁸⁴ There are four main reasons—proceeding chiefly from concerns of policy and practicality—for the Supreme Court’s preferred approach. First, Lord Neuberger said that the right answer to the debate is ‘the simple’ one because ‘clarity and simplicity are desirable qualities in the law’.⁸⁵ Secondly, there is no reason why the principal of a fiduciary who took a bribe or secret commission should be in a worse-off position than one whose fiduciary had obtained an unauthorised benefit in less blameworthy circumstances.⁸⁶ Thirdly, ‘wider policy considerations’ justify the availability of proprietary relief. Lord Neuberger acknowledged the evils of bribery and secret commissions and their harmful impact on the commercial world as well as the wider society.⁸⁷ Finally, he opined that it is desirable for English law to cohere with the approaches taken by the rest of the common law world.⁸⁸

We argue that the Supreme Court’s analysis, in particular Lord Neuberger’s remarkable volte-face, is underlined by commercial considerations. Disputes concerning secret commissions frequently, if not invariably, arise in the commercial context, as was the case in *FHR*. In *FHR*, the buyers of a hotel claimed against their consultant, appointed as the buyers’ agent in the sale negotiations, for receiving an undisclosed commission from the seller. As for bribes,⁸⁹ they are frequently offered to another party (for instance, public officials⁹⁰) to obtain a business advantage. In Lord Neuberger’s view, a rule that excludes proprietary relief for bribes and secret commissions based on subtle distinctions—which can be drawn variously—of what is considered to be the principal’s property does not promote certainty.⁹¹ Post *FHR*, commenting extra-judicially on the English rejection of the remedial constructive trust, Lord Neuberger reiterated the need for predictability in respect of legal principles in ‘these days of expensive litigation and complex and cross-border commercial transactions’.⁹² The Supreme

⁸⁴ *FHR* [2014] 3 WLR 535 at [32].

⁸⁵ *FHR* [2014] 3 WLR 535 at [35].

⁸⁶ *FHR* [2014] 3 WLR 535 at [41].

⁸⁷ *FHR* [2014] 3 WLR 535 at [42].

⁸⁸ *FHR* [2014] 3 WLR 535 at [45].

⁸⁹ Although conventional reference differentiates between a bribe and a secret commission, the substantive distinctions are not immediately clear.

⁹⁰ Indeed, the policy basis for the standalone offence of ‘bribery of a foreign public official’ under section 6 of the Bribery Act 2010 is to ‘prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official’s request, assent or acquiescence’. See the Bribery Act 2010 – Guidance at p 11, at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (accessed at 28 September 2016).

⁹¹ *FHR* [2014] 3 WLR 535 at [35].

⁹² Lord Neuberger, ‘The Remedial Constructive Trust – Fact or Fiction’ at the Banking Services and Finance Law Association Conference, Queenstown, New Zealand (10 August 2014), available at: <https://www.supremecourt.uk/docs/speech-140810.pdf> (accessed at 28 September 2016). It should also be noted that Lord Neuberger, in the same speech, said that where the domestic context is concerned, some (though not himself) ‘may think certainty [of legal principles] is less important’. Lord Sumption has underlined English

Court's intuitive preference for a simple answer may thus be explained by the fact the problem of bribes and secret commissions almost always arises in the commercial context.

Indeed, the Supreme Court's tough stance is consistent with the 'zero tolerance' attitude enshrined in the Bribery Acts 2010 as well as international conventions.⁹³ The Bribery Act 2010 came into force in the UK on 1 July 2011.⁹⁴ A main objective of the Bribery Act 2010 is to eradicate corruption and bribery in the commercial world—it does so through various means, including requiring commercial organisations to put in place procedures to prevent persons associated with it from bribery. The national policy on bribery and corruption was therefore crystal clear by the time of appeal before the Court of Appeal and Supreme Court. The clear availability of proprietary relief in cases concerning bribes and secret commissions under English law provides stronger deterrence⁹⁵ than personal relief against such forms of wrongdoing.⁹⁶

Even Lord Neuberger's comment on harmonisation of legal principles⁹⁷ within the common law world is in part underpinned by practical and commercial concerns. Extra-judicially, in the course of reflecting upon the Supreme Court's decision in *FHR*, Lord Neuberger commented that 'in an increasingly global and competitive world, where most legal systems are civilian, the common law jurisdictions need to ensure a degree of coherence and consistency in their case-law in order to present a credible and effective legal system'.⁹⁸ Here, Lord Neuberger clearly meant judicial competition for international litigation business,⁹⁹ and such claims are chiefly of a commercial nature or arising from the commercial context. Part of the aim is therefore to develop a set of legal principles that will encourage the choice of English law as the governing law of contracts, which will most likely

law's opposition to the remedial constructive trust in *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [27]. The case is considered below.

⁹³ *FHR* [2014] 3 WLR 535 at [42].

⁹⁴ The legislation entered into force after the key events of the *FHR* dispute had taken place. There was therefore no question of criminal liability on the part of the commercial parties in *FHR* under the Act.

⁹⁵ Cf Katy Barnett, 'Distributive justice and proprietary remedies over bribes' (2015) 35 LS 302, 305-306

⁹⁶ *FHR* [2014] 3 WLR 535 at [42].

⁹⁷ Supported by Leeming JA in *Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd* [2014] NSWCA 266 at [71]: 'There is frequently much to be learnt from the experience of other jurisdictions whose legal systems share a common ancestor'. Compare French CJ, extra-judicially: 'There is a degree of commonality in our jurisdictions but some important issues are ongoing including the proper scope of equitable compensation and how it may differ according to the nature of the equitable wrong' (RS French, (n 66) 28).

⁹⁸ Lord Neuberger, 'Equity – The soul and spirit of all law or a roguish thing?', Leane Lecture 2014 (Supreme Court of New South Wales, Sydney, 4 August 2014), available at: <https://www.supremecourt.uk/docs/speech-140804.pdf> (accessed at 28 September 2016).

⁹⁹ See the success of the English Commercial Court in attracting international litigation: The Honourable Mrs Justice Carr, 'Closing Address for British Turkish Lawyers Association seminar- the Inner Temple' (13 September 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/justice-carr-btla-190913.pdf> (accessed at 28 September 2016); Jane Croft, 'Three-quarters of litigants in UK Commercial Court are foreign', *The Financial Times* (29 May 2014). See further the introduction of the Financial List, a specialist court to deal with financial claims. See G McMeel, 'A New Financial Court for London' [2016] LMCLQ 1.

lead to the choice of English courts¹⁰⁰—being the forum most conversant in the application of English law—for the resolution of disputes arising therefrom.

Hence, harmonisation of legal developments is pursued partly for pragmatic reasons. If harmonisation is a desirable end in itself, Lord Neuberger or English law¹⁰¹ would be far more open to recognising a remedial constructive trust, a doctrine that has been affirmed in a number of common law jurisdictions, namely, Australia,¹⁰² Canada,¹⁰³ New Zealand¹⁰⁴ and Singapore.¹⁰⁵ The objection against the recognition of a remedial constructive trust generally emanates from concerns of unconstitutional redistribution of property rights based on judicial discretion and the uncertainty of its operation being founded upon exercise of judicial discretion.¹⁰⁶ However, the same concern of ‘redistribution of property rights’ arises in respect of the Supreme Court’s decision in *FHR*. Whilst explicitly rejecting the ‘property law’ camp of academic views on the debate for generating uncertainty, there was a tinge of equivocation in Lord Neuberger’s reasoning. He said that ‘in many cases, the bribe or commissions will very often have reduced the benefit from the relevant transaction which the principal will have obtained, and therefore can fairly be said to be his property’.¹⁰⁷ And whilst Lord Neuberger adopted counsel’s argument that ‘any benefit acquired by the agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal’,¹⁰⁸ he seemingly did so largely because the simple answer is the right answer (following Occam’s Razor).¹⁰⁹ For, if otherwise, his Lordship would not have considered the debate to be one with ‘no plainly right answer’.¹¹⁰

¹⁰⁰ Whether pre-dispute by way of a choice of court agreement or post-dispute.

¹⁰¹ *Bailey v Angove’s PTY Ltd* [2016] 1 WLR 3179 at [27].

¹⁰² See, for eg, *Muschinski v Dodds* (1985) 160 CLR 583; *John Alexander’s Club Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.

¹⁰³ See, for eg, *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR 14.

¹⁰⁴ *Regal Castings Limited v Lightbody* [2009] NZLR 433; *John Hanita Pak v AG of New Zealand* [2014] NZSC 18 at [163] (Elias CJ) and [297]-[312] (Young J). However, the availability of a remedial constructive trust under New Zealand law has yet to be conclusively determined by the New Zealand Court of Appeal: see *Boat Harbour Holdings Ltd v Mowat* [2012] NZCA 305 at [51]; *Strategic Finance Ltd (in receivership and in liquidation) v Bridgman* [2013] NZCA 357 at [122]-[126].

¹⁰⁵ See, for eg, *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801.

¹⁰⁶ Lord Neuberger, ‘The Remedial Constructive Trust – Fact or Fiction’ at the Banking Services and Finance Law Association Conference, Queenstown, New Zealand (10 August 2014), available at: <https://www.supremecourt.uk/docs/speech-140810.pdf> (accessed at 28 September 2016).

¹⁰⁷ *FHR* [2014] 3 WLR 535 at [43].

¹⁰⁸ *FHR* [2014] 3 WLR 535 at [35] (see also [33]). See also trenchant criticisms by Campbell: J C Campbell, ‘When and Why a Bribe is Held on a Constructive Trust: The Method of Reasoning Towards an Equitable Remedy’ (2015) 39 Aust Bar Rev 320, 321–325.

¹⁰⁹ cf Lord Sumption in *Jetivia SA & Anor v Biltal (UK) Ltd* at [104]: ‘I agree with Lord Toulson and Lord Hodge that Occam’s Razor is a valuable analytical tool, but only if it is correctly understood. *Entia non sunt multiplicanda praeter necessitatem*. Do not gratuitously multiply your postulates.’

¹¹⁰ *FHR* [2014] 3 WLR 535 at [35].

(b) *FHR*: Implications for Modern Equity

The lack of a clear conceptual basis for the *FHR* decision has profound implications for trust law. First, it is harder than before to identify a single unifying principle to explain why constructive trusts arise,¹¹¹ save for a rationalisation pitched at a high level of abstraction, such as ‘unconscionability’.¹¹² Secondly, the *FHR* decision creates the possibility for courts to award proprietary relief in circumstances based on considerations of policy and practicality¹¹³—the emergence of legal realism that was not previously well received by English law. It is difficult to predict when a constructive trust will arise in a new set of circumstances. Thirdly, the interplay between proprietary and personal relief (account of profits)¹¹⁴ for receiving unauthorised benefits in breach of fiduciary duty has been transformed. A consequence of *FHR* is the availability of proprietary relief in nearly every case.¹¹⁵ Accordingly, the interplay between the two kinds of remedies is presently far less concerned with availability; it has instead become primarily concerned with election by the claimant.¹¹⁶

The infiltration of the fiduciary doctrine into the commercial world accentuates problems (taking of bribes and secret commissions) that are infrequently encountered in the domestic context. In one sense, *FHR* redirects our attention to focus on the severity of wrongdoing in crafting appropriate remedies,¹¹⁷ as opposed to the kind of wrongdoing. Lord Neuberger’s previous view in *Sinclair Investments* distinguished between ‘abuse of principal’s property’ cases and ‘abuse of position’ cases.¹¹⁸ That view was conservatively focused on the proprietary foundation of the constructive trust, and might fairly represent the wisdom of an era where equity sharply distinguished between property rights and personal obligations. *FHR*, on the other hand, treats the remedy as a means to deter wrongdoing and enforce primary obligations. Underlining the *FHR* decision is therefore a decision to shape equitable principles to appropriately respond to the issues that arise in the commercial

¹¹¹ G Virgo, *The Principles of Equity & Trusts*, 2nd edn (OUP, 2016), p 305 and pp 327-28. See further section 5 below.

¹¹² *Paragon Finance plc v DB Thakerar and Co* [1999] 1 All ER 400, 408 (Millet LJ).

¹¹³ See *Patel v Mirza* [2016] 3 WLR 399 at [170]. Lord Neuberger holds the view that correct legal analysis is ‘not the centrally important issue’, if the question confronting the court is based on policy.

¹¹⁴ Account of profits continues to exist in English law: see *Novoship (UK) Ltd v Mikhaylyuk* [2014] WLR (D) 297; *Global Energy Horizons Corporation v Gray* [2015] EWHC 2232 (Ch).

¹¹⁵ D Whayman, ‘Proprietary remedy confirmed for bribes and secret commissions’ [2014] Conv 518, 524.

¹¹⁶ A corollary consequence is that there is no longer the concern that the account is unable to ‘mop up’ all the unauthorised benefits that a fiduciary has derived from the breach of duty.

¹¹⁷ Although some may take the view that the effect of *FHR* is to accord equal remedial treatment to all breaches of fiduciary duty (see D Whayman, ‘Proprietary remedy confirmed for bribes and secret commissions’ [2014] Conv 518, 523-524), it should not be missed that where a fiduciary has acted in good faith, he may be awarded equitable allowance (see *Boardman v Phipps* [1964] 1 WLR 993). As such, it is certainly arguable that the real effect of *FHR*, mapped on to existing principles, is to craft remedies based on severity of wrongdoing.

¹¹⁸ *Sinclair Investments* [2011] 3 WLR 1153 at [80]. Lord Neuberger said that there is a ‘fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant’.

context, in partnership with domestic statute and international influence. By affirming that a principal is entitled to assert a proprietary claim over benefits received by a fiduciary in breach of his loyalty (personal obligation), regardless of whether they are derived from the interference with the principal's property, English law has further blurred the divide between obligation and property. This brings to mind Worthington's argument a decade ago: 'equity, according to persistent commercial pressure, has effectively eliminated the divide between property and obligation, or between property rights and personal rights'.¹¹⁹ To put it simply, *FHR* says that what you are 'owed' becomes what you 'own'.

Finally, *FHR* is seemingly difficult to reconcile with the subsequent Supreme Court decision in *Bailey v Angove's PTY Ltd*,¹²⁰ complicating matters yet further. In *Bailey*, Lord Sumption said in *obiter*¹²¹ that a constructive trust recognised by Bingham J in *Neste Oy v Lloyd's Bank Plc*¹²² was unjustifiable. The *Neste Oy* constructive trust is said to arise over money held by an agent whom, receiving the same for its principal or on its account, could not in good conscience retain the money owing to the agent's insolvency. Lord Sumption, taking the side of the 'property law' camp in *Bailey*,¹²³ criticised the holding in *Neste Oy* as being contrary to the requirement of identifiable trust property in order for a trust to arise under English law. This is because the money in that case was transferred to the agent with intention that he received full beneficial ownership. In rejecting the *Neste Oy* constructive trust, Lord Sumption ironically relied on¹²⁴ an excerpt from Goode's article¹²⁵ in which Goode clearly opposed awarding proprietary relief for bribes and secret commissions received in breach of fiduciary duty. Perhaps conscious of the potential inconsistency with *FHR*, Lord Sumption then pronounced that a constructive trust may nevertheless arise over money paid with the intention of transferring the beneficial interest to the recipient where the intention was vitiated (e.g. on the basis of mistake) or the money represented the fruits of fraud, theft or breach of trust/fiduciary duty.¹²⁶

Lord Sumption's disapproval of the *Neste Oy* constructive trust is not the issue. The issue lies with his reasoning which in part contradicts Lord Neuberger's judgment in *FHR*. Moreover, notwithstanding Lord Browne-Wilkinson's criticisms in *Westdeutsche Landesbank Girozentrale v Islington LBC*,¹²⁷ Lord Sumption—with respect, rather

¹¹⁹ S Worthington, 'The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectations' (2007) 42 *Tex International Law Journal* 918.

¹²⁰ [2016] 1 WLR 3179. See P Watts, 'The insolvency of agents' (2017) 133 LQR 11 and H Wong, 'Proprietary restitution and constructive trusts in the Supreme Court' [2016] Conv 480.

¹²¹ With whom Lords Neuberger, Clarke, Carnwath and Hodge agreed.

¹²² [1983] 2 Lloyds Rep 658, followed in *In re Japan Leasing Europe Plc* [1999] BPIR 911.

¹²³ See discussion above at text to n 67.

¹²⁴ *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [26].

¹²⁵ R Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433, 444.

¹²⁶ *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [30].

¹²⁷ [1996] AC 669 at [704]-[716].

evasively—appeared not completely averse towards proprietary restitution for mistake, in particular, as a possible, alternative basis for the outcome in *Bailey*.¹²⁸ His Lordship declined to consider the alternative mistake analysis¹²⁹ on the basis that it would go beyond the scope of the appeal,¹³⁰ and yet his Lordship’s disapproval of *Neste Oy* was itself obiter, given the prior conclusion as to the agent’s authority on the first point of the appeal.¹³¹

Such subtle (and partial) judicial tergiversation in the already troubled equitable waters further illustrates the Supreme Court’s propensity for subjecting trust law principles to commercial dexterity—essentially, pick the explanation that supports the desired outcome. While the Supreme Court loathes the remedial constructive trust, it seems to practise a more disguised form of ‘discretionary remedialism’.

5. Liability of Third Parties

(a) Limitation

The final category of cases which we shall consider here concerns the liability of third parties or strangers to the trust.¹³² In England, the Supreme Court addressed some key questions in respect of such claims in *Williams v Central Bank of Nigeria*,¹³³ which concerned an alleged sophisticated fraud on the claimant, whose claim was said by the defendants to be out of time. S 21 of the Limitation 1980, provides, so far as relevant, that:

- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action
 - (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
- ...
- (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of

¹²⁸ *Bailey v Angove’s PTY Ltd* [2016] 1 WLR 3179 at [32].

¹²⁹ Eg, the analysis of Mann J in *In re Farepak Food and Gifts Ltd* [2008] BCC 22 at [39]–[40].

¹³⁰ *Bailey v Angove’s PTY Ltd* [2016] 1 WLR 3179 at [32].

¹³¹ *Bailey v Angove’s PTY Ltd* [2016] 1 WLR 3179 at [18]: ‘it is strictly speaking unnecessary to deal with the point’.

¹³² ‘Strangers to the trust’ is of course shorthand as liability may extend to conduct relating to breaches of fiduciary (and other equitable duties) *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 W.L.R. 526 at [92]; *Westpac Banking Corp v Bell Group Ltd (No.3)* (2012) 44 W.A.R. 1 at [2714]–[2733].

¹³³ [2014] AC 1189. For fuller and more specific criticism, see J Lee, ‘Constructing and Limiting Liability in Equity’ (2015) 131 LQR 39.

limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

By a majority (Lord Clarke dissenting on this point), the Court held that, both for purposes of limitation, and more generally, dishonest assistants and knowing recipients are not constructive trustees in a true sense. Rather, a stranger to the trust ‘is not in fact a trustee at all, even though he may be liable to account as if he were’.¹³⁴ Additionally (Lord Mance dissenting on this point), in the particular context of s21(1)(a), an ‘action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy’, only refers to an action for breach of trust against the trustee (not to other actions which might more broadly be said to be ‘in respect of’ a breach of trust, such as dishonestly assisting a fraudulent trustee). This conclusion means that the six-year limitation period under s 21(3) applies to all claims against strangers to the trust, although, peculiarly, in that section ‘in respect of any breach of trust’ does include such claims. It also means that the nature of the trustee’s breach does not affect whether a limitation period applies.

Lord Sumption found support for his approach of limiting the exceptions to limitation in the judgment of Lord Hoffmann in the Hong Kong case of *Peconic Industrial Development Ltd v Lau Kwok Fai*¹³⁵ (although the dissenting Lord Mance was notably critical of Lord Hoffmann’s approach).¹³⁶ And indeed, it must be conceded that the approach of the Supreme Court is in line with other common law jurisdictions. In *Yong Kheng Leong v Panweld Trading Ltd*,¹³⁷ the Singapore Court of Appeal considered a claim brought by a private company against one of its directors in respect of alleged financial irregularities, and against the director’s wife. Although the court’s observations on limitation were strictly obiter,¹³⁸ they are of relevance here, as the material provisions of s 22 of the Singapore Limitation Act replicate those of the 1980 Act. The Court held that the distinction between constructive trustees (now endorsed in *Williams*) holds true for Singapore, and for the law of limitation. The question is whether ‘the person holds property in the position of a trustee... and deals with that property in breach of trust’.¹³⁹ There was no challenge to the conclusion that the six-year limitation period applied to a claim against the director’s wife for knowing receipt.

¹³⁴ *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400, per Millett LJ at 408–409, endorsed by Lord Sumption in *Williams* at [9]–[11]. *Williams* was endorsed and applied by Bell AJ in *Atkinson v Berry* [2014] NZHC 2318, [27] (considering the then applicable s 21 of the NZ Limitation Act 1950). Cf the position in New South Wales: *Sze Tu v Lowe* [2014] NSWCA 462 [326]–[339], especially at [336]–[337].

¹³⁵ [2009] HKCFA 16.

¹³⁶ *Williams* at [154].

¹³⁷ [2013] 1 SLR 173.

¹³⁸ As the Court dismissed the appeal on the challenge to the facts decided (and conceded below): [2013] 1 SLR 173, [34]–[35].

¹³⁹ [2013] 1 SLR 173, [46].

The decision in *Williams* is less overtly based on commercialist reasoning than either *AIB* or *FHR*, admittedly: however, we argue that it fits the trend, not least in the light of subsequent cases. In particular, as we examine through a comparative angle in the next section, recent authorities from various common law jurisdictions on the liability of strangers to the trust demonstrate reluctance on the part of the courts to subject such parties (typically commercial actors who do not voluntarily undertake onerous equitable obligations) to extensive liability.¹⁴⁰ In particular, in addition to considering Australian developments, our analysis compares English law with the developments in other commercially-focused common law jurisdictions, such as Singapore and Hong Kong. The convergence of judicial attitudes within the common law world strongly indicates that English law is not alone in its commercialist treatment of equity.

(b) Standards for Liability

Williams was the first time in a decade that the Supreme Court (or House of Lords) had substantively considered either ancillary liability in equity.¹⁴¹ The case was argued on the basis, which the majority *Williams* accepted, that the principles as to establishing the liability of strangers are largely settled, without interrogating some remaining uncertainties that go to the nature of liability. As cases from the English Court of Appeal and other jurisdictions show, other issues arising in the commercial context may well require consideration at the highest level in England again soon.

We deal with dishonest assistance first, and only briefly, since the *nature* of the liability is less controversial than that in knowing receipt. English law has had some struggles with the test for dishonesty,¹⁴² but the law now appears to have settled on an objective test.¹⁴³ It has been clear in England since the Privy Council decision in *Royal Brunei Airlines v Tan*¹⁴⁴ that there is no requirement for the trustee themselves to be dishonest. In Australia, however, the High Court insisted that an action does require there to have been knowing assistance in a dishonest and fraudulent design on the part of the trustee or fiduciary.¹⁴⁵

¹⁴⁰ In *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10 Lord Toulson, speaking of the liability of a joint tortfeasor, noted (at [39]) that ‘In reality, the limitations which the courts have placed upon the scope of liability as a joint tortfeasor are founded on a pragmatic concern to limit the propensity of the law of tort to interfere with a person’s right to do things which are in themselves entirely lawful.’ For further detail, see P Davies, *Accessory Liability* (Hart, Oxford, 2015) chs 4 and 6.

¹⁴¹ Since *Criterion Properties Plc v. Stratford UK Properties LLC* [2004] UKHL 28. There had been some Privy Council decisions, such as *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd (Isle of Man)* [2005] UKPC 37 and *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30.

¹⁴² J Lee ‘Fidelity in interpretation: Lord Hoffmann and the Adventure of the Empty House’ (2008) 28 LS 1.

¹⁴³ *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [25] (Sir Andrew Morritt C) and *Central Bank of Ecuador & Ors v Conticorp SA & Ors (Bahamas)* [2015] UKPC 11 at [9] (Lord Mance).

¹⁴⁴ [1995] 2 AC 378

¹⁴⁵ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd (Farah)* [2007] HCA 22; 230 CLR 89, on a strict interpretation of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252.

Hasler v Singtel Optus Pty Ltd,¹⁴⁶ the New South Wales Court of Appeal disapproved a Western Australian decision¹⁴⁷ which had been understood to have misinterpreted this criterion insofar as it related to the nature of the breach of the primary duty. In *Hasler*, the court refused to lower the standard for such claims in dishonest assistance: ‘It is plain (in Australia) that it is the quality of the fiduciary’s breach which must answer the description of “dishonest or fraudulent”’.¹⁴⁸ The effect of the Australian position is to confine the potential for the liability of an accessory (who does not procure or induce the breach) to those breaches which are dishonest,¹⁴⁹ and thus to make the action’s availability much more limited in commercial litigation than it would be in England.

The reluctance to expose commercial actors to extensive equitable liability can also be seen in *Novoship (UK) Ltd v Mikhaylyuk*.¹⁵⁰ A full account of the decision in that case is beyond our scope here. But in the context of a claim in dishonest assistance in respect of a complicated bribery scheme, the Court of Appeal insisted on a special causation test which worked in favour of the defendant because he was not ‘a true fiduciary’.¹⁵¹ The Court went on to state that ‘where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then... the court has a discretion to grant or withhold the remedy.’¹⁵² The general approach in *Novoship* has since been endorsed by the Board of the Privy Council.¹⁵³ This retention of discretion fits with the trend we have seen for a measure of flexibility in judicial decision-making in the commercial context, and is also applicable in knowing receipt, to which we now turn.

The starting point of the modern English law on knowing receipt is *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*, which concerned a loan made to the bank at a very generous rate of interest.¹⁵⁴ The Court of Appeal determined that the state of the recipient’s knowledge should be ‘such as to make it unconscionable for him to retain the benefit of the receipt’.¹⁵⁵ Of particular note for present purposes is that Nourse LJ expressly framed it within a commercial objective in mind:

¹⁴⁶ [2014] NSWCA 266.

¹⁴⁷ *Westpac Banking Corporation v Bell Group Ltd (No 3)* [2012] WASCA 157; 44 WAR 1

¹⁴⁸ *Hasler* [2014] NSWCA 266, [110] (Leeming JA).

¹⁴⁹ *Hasler* [2014] NSWCA 266, [125] (Leeming JA).

¹⁵⁰ [2015] 2 W.L.R. 526

¹⁵¹ [2015] 2 WLR 526, [115].

¹⁵² [2015] 2 WLR 526, [119].

¹⁵³ In *Central Bank of Ecuador and others v Conticorp SA* [2015] UKPC 11 (judgment on interest and costs) [9], speaking in the context of the discretion to award compound interest.

¹⁵⁴ [2001] Ch 437.

¹⁵⁵ [2001] Ch 437, 455.

A test in that form... should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made¹⁵⁶

In applying that test to the facts, the Nourse LJ held that the defendant Akindele, who had now knowledge of underlying frauds at the bank, did not have the requisite knowledge in all the circumstances: the defendant had viewed it ‘simply as an arm’s length business transaction’.¹⁵⁷

In Hong Kong, a key case in this thread is *Thanakharn Kasikorn Thai Chamkat v Akai Holdings*,¹⁵⁸ (featuring then Jonathan Sumption QC as counsel and Lord Neuberger as judge). The case concerned the appropriate standard for judging whether it was justifiable for a Bank to have relied on an agent’s apparent authority to act in a transaction. Lord Neuberger noted that ‘at least when it comes to normal commercial transactions, the application of the concept of constructive notice, which is what Akai’s approach effectively involves, has been deprecated’¹⁵⁹ and that

In a commercial context, absent dishonesty or irrationality, a person should be entitled to rely on what he is told: this may occasionally produce harsh results, but it enables people engaged in business to know where they stand.¹⁶⁰

Later his Lordship observed ‘how the law in this field struggles to reconcile principle and predictability with commercial reality and fairness’,¹⁶¹ and thus sought to avoid laying down any rigid principles, in an echo of Nourse LJ in *Akindele*.¹⁶² Having adopted that commercially friendly approach, Lord Neuberger held that the bank nevertheless failed to establish that it had acted rationally, evaluating it in terms of ‘commercial common sense’ on the basis of both its own practice and that of Thai banks more broadly.¹⁶³ And, again, Lord Neuberger found that it was particularly important in the commercial context that the common law test for reasonable reliance on apparent authority of an alleged agent should be effectively identical to the equitable test for a claim in knowing receipt.¹⁶⁴

It makes little commercial sense, and would provide a fertile source of confusion and inconsistency, if the tests were different ... above all in a case involving knowing receipt in

¹⁵⁶ [2001] Ch 437, 455.

¹⁵⁷ [2001] Ch 437, 457.

¹⁵⁸ [2010] HKCU 2362.

¹⁵⁹ *Akai Holdings*, [51].

¹⁶⁰ *Akai Holdings*, [52].

¹⁶¹ *Akai Holdings*, [70].

¹⁶² Although it may be noted that Lord Neuberger left open the point as to whether unconscionability as stated in *Akindele* is the correct approach in knowing receipt: *Akai Holdings*, [128].

¹⁶³ *Akai Holdings*, [89].

¹⁶⁴ *Akai Holdings*, [135].

an arm's length commercial context, I consider that, at any rate absent very special facts, equity would follow the law.¹⁶⁵

An application of these explicitly commercial considerations can be seen in the Singapore case of *George Raymond Zage III v Ho Chi Kwong*.¹⁶⁶ The Court of Appeal drew upon both *Akindele* and *Akai Holdings* in addressing the consequences of a fraud by a solicitor on two of his clients. The fraudulent solicitor had then bought jewellery and precious stones from the defendant jewellery firm, buying in two batches – one in respect of the majority of the items, and then a second payment which was via a cash cheque identifying it as coming from a client account. That cheque was handed to a Mr Ho, who was a director of the jewellery and an experienced businessman.

The clients sought to claim against the jeweller in both dishonest assistance and knowing receipt. The action for dishonest assistance failed because the Court of Appeal was not satisfied that the jeweller had assisted in the breach by passive receipt of funds or that it was dishonest, though the latter finding was not properly explained.¹⁶⁷ The jeweller was held liable for knowing receipt of a portion of the proceeds. On knowing receipt, the Court cautioned that:

courts should be very slow in imputing knowledge of wrongdoing when assessing the propriety of commercial transactions. In the *absence of established commercial practices* or obviously questionable conduct on the part of a counter-party, merchants are not ordinarily expected to make searching inquiries into their customers' source of funds. To demand such diligence in the course of ordinary commercial transactions would unduly constrict trading activities.¹⁶⁸

In so holding, the Court delved into considerable detail on the nuances of the etiquette of jewellery purchases, and luxury goods more broadly.¹⁶⁹ This might be thought to be 'commercialist' reasoning on a relatively micro-scale,¹⁷⁰ not least because the Court stated that 'real estate transactions that might involve lengthy investigations into title and the existence of conflicting interests do not set normative standards in transactions for the sale and purchase of goods' (even 'for very large purchases').¹⁷¹

¹⁶⁵ *Akai Holdings*, [135].

¹⁶⁶ [2010] 2 SLR 589.

¹⁶⁷ [2010] 2 SLR 589 at [43]. VK Rajah JA, delivering the judgment of the Court of Appeal, merely stressed that the knowledge requirement for both causes of action, though similar, remain 'conceptually distinct'. There is a strong sense that the Court was careful not to label commercial actors as 'dishonest', given the reputational repercussions. A similar, though separate concern was found in Lord Hutton's now disapproved combined test for dishonesty in the context of the solicitor in *Twinsectra Limited v Yardley* [2002] UKHL 12 at [35].

¹⁶⁸ [2010] 2 SLR 589 at [52] (emphasis added).

¹⁶⁹ [2010] 2 SLR 589 at [46].

¹⁷⁰ The court noted (at [46]) the then absence of obligations in respect of money laundering regulations in Singapore.

¹⁷¹ [2010] 2 SLR 589 at [46].

The Court went on to note that the subsequent receipt of a cash cheque labelled as being from the firm's client account did give rise to the requisite level of knowledge to 'a sophisticated businessman' such as Mr Ho: 'This was not, on the face of it, a method of payment that a person with Ho's background and experience could properly regard as legitimate.'¹⁷² *George Raymond Zage III v Ho Chi Kwong* therefore demonstrates the very flexibility in application of traditional principles of Equity encouraged by *Akindele* and *Akai Holdings*. It also serves to highlight a further tension in the courts' reasoning. *Akindele* endorsed unconscionability as a supposedly objective, yet flexible standard (by virtue of its deliberate vagueness)¹⁷³ that is applicable to commercial contexts. And yet we find that the courts still wish to retain the ability to judge by a different, but still supposedly objective and flexible standard in the form commercial expectations or established practice for particular contexts.

In this area, the commercial paradigm¹⁷⁴ perhaps explains the relative lack of judicial interest in the case law in the more nuanced arguments about the nature of claims in knowing receipt, and whether it is, as Mitchell and Watterson have argued, a distinctive, primary, custodial liability'.¹⁷⁵ Rather, it was sufficient to decide in *Williams*, for example, that knowing recipients are not trustees, reinforcing the independence of the wrong from the (decided to be) fictive language of trusteeship.¹⁷⁶ *Williams* thus establishes the clear dividing line for commercial actors to be able to avail themselves of the limitation period, even if the interpretation is decidedly awkward.¹⁷⁷ The authorities considered in this section are thus in line with the trend which we have seen *AIB*, *FHR* and even *Bailey*.

¹⁷² [2010] 2 SLR 589 at [50].

¹⁷³ As to which, see G Virgo, 'Whose Conscience? Unconscionability in the Common Law of Obligations' in A Robertson and M Tilbury (eds), *Divergences in Private Law* (Hart, Oxford 2016) 293.

¹⁷⁴ Lord Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life - Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 *Sydney Law Review* 187.

¹⁷⁵ C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Hart, Oxford, 2010), 129. This was supported by Sir Terence Etherton in the Privy Council decision of *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at [37]. Sir Terence has served as Chancellor and was recently appointed to succeed Lord Dyson as Master of the Rolls (returning a Chancery lawyer to the role). Compare D Whayman, 'Remodelling knowing receipt as a gains-based wrong' [2016] JBL 565.

¹⁷⁶ See J Glister and J Lee, *Hanbury & Martin: Modern Equity*, 20th edn (Sweet & Maxwell, London, 2015) paras 25-004.

¹⁷⁷ Lee (n 133) 42-3.

6. Conclusions

Lord Browne-Wilkinson famously cautioned against ‘the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs’.¹⁷⁸ Our argument has shown that recent jurisprudence suggests that care should be taken in the opposite direction too. We have seen that the influence and impact of commercial (and Scots) rather than Chancery lawyers in part explains the revisionist creativity on display. The framing of issues is important: Lord Sumption, for example, began his judgment in *Bailey* – a case which, as we have seen, raised important questions about the law of constructive trusts – by stating that the appeal raised ‘two important and controversial questions of *commercial law*’.¹⁷⁹

It is important to be clear that the target of our criticism here is very much the tone and structure of the reasoning in the key authorities: it is perfectly possible to agree with the outcome of any one case without signing up to the route by which the court arrived at the conclusion. Nor is our argument that commercial considerations should be *irrelevant* to adjudication. Diversity of views can enrich the court’s reasoning. As More noted in *Utopia*:

You are not obliged to assault people with discourses that are out of their road, when you see that their received notions must prevent your making an impression upon them: you ought rather to cast about and to manage things with all the dexterity in your power, so that, if you are not able to make them go well, they may be as little ill as possible; for, except all men were good, everything cannot be right, and that is a blessing that I do not at present hope to see.¹⁸⁰

Our concern is rather with the demonstrable pattern in the cases of either subjugating the received notions of equity to commercial dexterity, or declining to engage with principle in the first place. Nor are appeals to commercial considerations always objectively ascertainable or verifiable. This commercialist flexibility comes at the expense of doctrinal coherence and a lack of development of equitable principles. Equity is being assaulted by commercialist discourse.

Our principal focus has been on the UK Supreme Court, and we have argued that next two rounds of appointments of Justices must recognise the need for Chancery experience, and the balance of specialist and generalist expertise. Importantly, there should not be any assumption that commercial experience is neutrally ‘generalist’. Yet we have further shown that the ‘commercialisation’ of equity is not however a purely national revolution. And our argument has broader horizons, especially when one turns to examine the developments in

¹⁷⁸ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 704G-705B. Compare also F Reynolds, ‘Commercial Law’ in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford, 2009), 704-5.

¹⁷⁹ [2016] UKSC 47 at [1] (Emphasis added).

¹⁸⁰ T More, *Utopia* (tr. Burnet, London 1808) 56.

jurisdictions that pride themselves as commercial hubs. In Hong Kong, there is a cross-pollination of the law from the judges in England and Australia sitting in the Court of Final Appeal: the influence of these judges is notable in commercial/Chancery cases.¹⁸¹ A wider, related issue is the extent to which the law, and the courts, in the various jurisdictions considered above are, and should be, sensitive to reflecting commercial reality and good sense, as a facet of being an attractive centre for the adjudication of international commercial litigation.¹⁸² For example, Singapore's goal of developing its own indigenous law contrasts with the rise of the Singapore International Commercial Court¹⁸³ (which is part of the initiative to internationalise the local legal sector): disputes before the latter will usually be presided over by international judges. It remains to be determined the extent to which cases before the Singapore International Commercial Court will influence the development of Singapore law, but our analysis suggests that caution is needed.¹⁸⁴ Throughout this article, we have used 'commercialisation' and 'commercialised' as shorthand for commercial considerations, and perhaps the considerations of commercial lawyers influencing reasoning in equity here.¹⁸⁵ But we have also used it advisedly, with the implicit undertone of the potential commodification of law, in England and elsewhere.

At the heart of the debate concerning the modern development of equity, then, lies the important query of what the law of trusts is meant to do, and to be. After this dystopian revolution, a restoration of principle is needed. But such a restoration requires us to consider more deeply what are the old ways of equity that no longer suit the modern world, and which, if any, must be abandoned.

¹⁸¹ Of cases mentioned here, see, eg, Lord Hoffmann NPJ in *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16, Lord Neuberger NPJ in *Thanakharn Kasikorn Thai Chamkat (Mahachon) (aka Kasikornbank Public Co Ltd) v Akai Holdings Ltd (in liquidation)* [2012] HKCU 2362, and Lord Millett NPJ in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 369.

¹⁸² See further the Honourable the Chief Justice Sundaresh Menon, Keynote Address at Singapore Academy of Law and Chancery Bar Conference 2013 'Finance, Property and Business Litigation in a Changing World' (Speech in Singapore, 25 April 2013).

¹⁸³ See M Yip, 'The Resolution of Disputes before the Singapore International Commercial Court' (2016) 65 ICLQ 439.

¹⁸⁴ See, for eg, *CPIT Investments Ltd v Qilin World Capital Ltd* [2016] SGHC(I) in which Vivian Ramsay International Judge delivered a decision on Singapore civil procedure, in relation to applications made in respect of a case which has been transferred to the Singapore International Commercial Court.

¹⁸⁵ Lord Sumption has noted that 'there is greater flexibility [in] the legal profession. The division between the chancery bar and the common law bar, which was once absolute, has become almost imperceptible' Sumption (n 34) 6.